

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**CURTIS LYONS,
Plaintiff,**

vs.

Civil Action No. 1:10CV57

**COUNTY COMMISSION OF PRESTON
COUNTY, WEST VIRGINIA, a public entity,
Defendant.**

ORDER/OPTION

On the 4th day of February 2011, Defendant, through counsel, filed a Motion to Compel Plaintiff's Discovery Responses [Docket Entry 33]. In its Motion, Defendant asserts that Plaintiff, who is represented by counsel, failed to respond to discovery requests served by Defendant. A review of the docket in this matter indicates no Response to the Motion to Compel has been filed by Plaintiff, and the time for such Response has passed. The matter has been referred to the undersigned United States Magistrate Judge for resolution [Docket Entry 34]. The matter is not complex and the Court resolves the issue without a hearing.

Defendant served its First Set of Interrogatories and Requests for Production of Documents on November 11, 2010. That date being a Federal holiday, Plaintiff's responses were due, at the very latest, December 15, 2010. No responses were served on or before that date. According to Defendant's Motion to Compel, on December 23, 2010, counsel for Defendant discussed the issue of the untimely discovery responses with Plaintiff's counsel, who agreed to provide Plaintiff's discovery responses within ten days. On January 11, 2011, counsel for Defendant sent a letter to Plaintiff's counsel regarding the continued failure to provide the discovery responses. According to Defendant's Motion, on January 19, 2011, counsel for Plaintiff advised "they were unable to

obtain the requested discovery and were withdrawing representation, if the Court permits.” A review of the docket as of February 23, 2011, shows no motion to withdraw by Plaintiff’s counsel and no Certificate of Service for any discovery responses by Plaintiff.

As already noted, there has been no Response filed to the Motion to Compel. It is undisputed that Defendant served its discovery requests on November 11, 2010. It is also undisputed that Defendant’s counsel in good faith conferred with Plaintiff’s counsel in an effort to obtain the discovery without court action. Fed. R. Civ. P. 37(a). It is finally undisputed, and a review of the record indicates, that no responses were timely filed to the discovery requests, and none have been filed as of February 23, 2011. Pursuant to Fed.R.Civ.P. 33(b)(4), all objections Plaintiff may have had to any of the discovery requests are therefore waived. It is therefore **ORDERED**:

1. Defendant’s Motion to Compel Plaintiff’s Discovery Responses [Docket Entry 33] is hereby **GRANTED**.
2. Plaintiff shall provide full and complete responses to all of Defendant’s discovery requests on or before **March 9, 2011**.
3. Pursuant to Fed. R. Civ. P. 37(a)(5)(A) and 37(d)(3), counsel for Defendant shall, on or before March 9, 2011, file with the Court and serve on counsel for Plaintiff a Motion for Fees and Costs containing an accounting of attorneys’ fees and costs incurred in preparing the Motion to Compel.
4. Within fourteen (14) days of service of the above-referenced accounting, Plaintiff shall file and serve his objection, if any, to the Motion for Fees and Costs and the amount claimed.
5. Only if both a Motion for Fees and Costs and an Objection to same are filed, shall the

Court schedule a hearing to provide an opportunity to be heard on the motion.

The Court notes that pursuant to Fed. R. Civ. P. 37(b) and 37(d)(3), sanctions for failure to comply in full with this Court's Orders or to further delay this matter by unreasonable failure to cooperate with Defendant's counsel in resolving discovery matters may result in sanctions which may include any of the sanctions available to the Court up to and including dismissal of the action.

It is so **ORDERED**.

The Clerk is directed to provide a copy of this Order to counsel of record.

DATED: February 23, 2011.

s/*John S. Kaull*
JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE